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Supreme Court of the United States

OCTOBER TERM 1940.

No. 1015

CHENILLE MANUFACTURING CO. INC., HARRY FARBER and RICHARD FARBER,

Petitioners,

against

MOSES J. SCHIFRIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

ROBERT J. BLUM,
Attorney for Petitioners.

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Supreme Court of the United States

OCTOBER TERM 1940.

CHENILLE MANUFACTURING CO. INC., HARRY FARBER and RICHARD FARBER, *Petitioners,*

against

MOSES J. SCHIFRIN, *Respondent.*

No. .

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Chenille Manufacturing Co. Inc., Harry Farber and Richard Farber, respectfully pray that a writ of certiorari issue to review a decree and order of the Circuit Court of Appeals for the Second Circuit (R. 68) entered February 6, 1941, reversing one of two orders (the decree does not specify which) of the United States District Court for the Southern District of New York.

The first District Court order (R. 20) vacated an interlocutory judgment (R. 8) entered against petitioners in an action for infringement of a patent, upon the ground that the court had no jurisdiction over the person of the

defendants. The second order (R. 35) granted a rehearing but adhered to the original decision.

Your petitioners also respectfully pray a review of the order of the Circuit Court of Appeals for the Second Circuit (R. 49) dated and entered March 29, 1941, denying petitioners' motion (made before the argument of the appeal) to dismiss the appeal to that court upon the ground that the first District Court order, vacating the judgment, was not appealable after a rehearing was granted (R. 36), and the appeal, filed before the second order was entered, was premature; and upon the ground that the orders are not appealable.

Jurisdiction

The date of the judgment and order of reversal of the Circuit Court of Appeals which your petitioners seek to review is February 6, 1941 (R. 68). The date of the order denying petitioners' motion to dismiss the appeals is March 29, 1941 (R. 49). The jurisdiction of this court is invoked under the provisions of United States Code, Title 28, Section 347, subdivision (a).

Statutes and Rule Involved

U. S. Code, Title 28, Section 394, provides:

> "Appearances personally or by counsel.—In all the Courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as, *by the rules of the said courts,* respectively, are permitted to manage and conduct causes therein." (Italics ours.)

General Rule 3 of the District Court provides:

> "Any person who has been for three years a member in good standing of the Bar of the State of New York, or of the Bar of the State of New Jersey, or who has been duly admitted to the Bar of either of those states when a member in good standing for five years of the Bar of some other state or territory or possession or the District of Columbia or of a foreign country, or who is a member in good standing of the Bar of the State of New York and for one year has been a law clerk of a Judge of the Circuit Court of Appeals for the Second Circuit or of a Judge of this Court or an Assistant United States Attorney, or an assistant to the United States Attorney, for the Southern District of New York, may be admitted to practice in this Court on compliance with the following provisions: * * *
>
> "Any member in good standing of the Bar of any state, or of the United States District Court, may upon motion be admitted to argue or to try any cause in whole or in part as counsel or advocate. *Only an attorney or proctor of this Court may enter appearances for parties, sign stipulations* or receive payment upon judgments, decrees or orders." (Italics ours.)

U. S. Code, Title 35, Section 11, provides:

> "The Commissioner of Patents * * * may prescribe rules and regulations governing the recognition of agents, attorneys, or other persons representing applicants or other parties *before his office* * * *." (Italics ours.)

New York Penal Law, Section 270, provides:

> "It shall be unlawful for any natural person to practice or appear as an attorney-at-law or as attor-

ney and counselor-at-law for a person other than himself in a court of record in this state or in any court in the State of New York, or * * * to hold himself out to the public as being entitled to practice law as aforesaid, or in any other manner, or to assume to be an attorney or counselor-at-law * * * or to assume, use, or advertise the title of lawyer, or attorney and counselor-at-law, or attorney, or counselor, or attorney and counselor, or equivalent terms in any language, in such manner as to convey the impression that he is a legal practitioner of law or in any manner to advertise that he either alone or together with any other persons or person has, owns, conducts or maintains a law office or law and collection office, or office of any kind for the practice of law, without having first been duly and regularly licensed and admitted to practice law in the courts of record of this state * * *."

Section 271 of the same law provides:

"No natural person shall ask or receive, directly, or indirectly, compensation for appearing for a person other than himself as attorney in any court or before any magistrate, or for preparing * * * pleadings of any kind in any action brought before any court of record in this state, or make it a business to practice for another as an attorney in any court or before any magistrate unless he has been regularly admitted to practice as an attorney or counselor, in the courts of record of the state * * *."

Section 272 of the New York Penal Law provides:

"Any person violating the provisions of Sections two hundred seventy * * * or two hundred seventy-one shall be guilty of a misdemeanor."

Section 236 of the New York Civil Practice Act, by amendment effective September 1, 1939, provides:

> "Any corporation * * * must appear by an attorney at law duly licensed to practice under the laws of this state."

Section 227 of Title 28 U. S. Code provides:

> "Where, upon a hearing in a district court, or by a judge thereof, in vacation, an injunction is granted, continued, modified, refused, or dissolved by an interlocutory order or decree, or an application to dissolve or modify an injunction is refused, * * * an appeal may be taken from such interlocutory order or decree to the circuit court of appeals."

Statement of the Matter Involved

Respondent holds a patent. His exclusive licensee claimed that petitioner corporation was infringing. The individual petitioners are officers of petitioner corporation.

In negotiations with respondent and his exclusive licensee, petitioners were advised by one Abraham Aaron, *whose office is in Brooklyn, New York* (R. 6, 16), but who, it turns out, has never been admitted to the Bar of New York or of the District Court. Mr. Aaron is a registered "patent attorney" and a member of the bar of the District of Columbia, but not elsewhere.

During the said negotiations, petitioners in good faith believed that Aaron was a fully licensed attorney of New York and of the District Court, competent to represent them in litigation (R. 17); so petitioners naturally introduced Aaron as their attorney. Respondent describes this

as an affirmative representation by petitioners that Aaron was duly admitted.

The negotiations culminated in a sublicense agreement between plaintiff's licensee and defendant corporation for a period of only 13 months from October 2, 1939, with one option to renew for one year (which was not exercised). At the same time Aaron, purporting to act as *attorney of record* for petitioners, signed the following papers in the District Court action: a notice of appearance (R. 6), a stipulation (R. 7) consenting to final judgment in favor of respondent, and an acknowledgment of receipt of a copy of the complaint (R. 5). According to respondent, petitioners' consent to judgment, and the making of the sublicense agreement between respondent's licensee and petitioner corporation, were *wholly independent* acts: respondent was "no party to such agreement" (the sublicense), he "never negotiated the terms of such agreement", he "was not instrumental in procuring the execution of such agreement", and "was not concerned with the terms of such agreement" (R. 31-32).

There was no issuance or service of process in the District Court action, and the interlocutory judgment (R. 8) entered November 24, 1939, was based exclusively upon the papers signed by Aaron. No defendant purported to enter an appearance in person.

Aaron was not even qualified for admission under General Rule 3 of the District Court, since he was not a member of the bar of New York or New Jersey (R. 19). He was practicing law in violation of the New York Penal Law, Sections 270-272, and was guilty of a misdemeanor. In New York he was a layman masquerading as an attorney, except only in respect of business with the office of the Commissioner of Patents.

Charged with infringement of patent, petitioners, who are laymen, were confronted with a situation which would present difficulties to many a lawyer. Like the average client, they leaned heavily on their legal adviser, so that the ultimate decision to consent to judgment was in fact that of Aaron rather than of petitioners. They acted only upon his "insistent" advice, believing that he was a fully licensed attorney at law, ignorant of his limitations (R. 17). They did not then know that his urgent advice to consent to judgment was influenced by the fact that *Aaron was incapable of defending litigation in any court in New York, state or federal.*

May 4, 1940, still ignorant of Aaron's non-admission to the Bar of New York or the District Court, petitioners filed a formal substitution of attorneys (R. 44A) and, through their new attorney, served notice of motion to vacate the judgment on the ground that their consent and the consideration therefor constituted an agreement illegally restraining trade in violation of the Anti-Trust Laws (R. 28).

May 6-8, 1940, petitioners learned *for the first time* (R. 16) that in 1939 they had not been represented by an attorney of New York and the District Court, as they had believed. Immediately petitioners, appearing specially, made a motion "for an order vacating and setting aside the judgment entered herein * * * upon the ground that the court never acquired jurisdiction over the defendants or of the action" (R. 11). That motion was granted *by the same judge* who signed the interlocutory judgment (R. 21).

Respondent's motion for reargument was granted, but the original decision was adhered to (R. 36).

The District Court order vacating the interlocutory judgment was dated June 8, 1940 (R. 20) entered June

10, 1940 (R. 44A). The order granting leave to reargue, but adhering to the original decision was dated July 1, 1940 (R. 35), entered July 11, 1940 (R. 44A). Notice of appeal from both orders was filed July 3, 1940 (R. 44A).

Before the argument of the appeal petitioners made a motion before the Circuit Court of Appeals to dismiss the appeal upon the grounds (a) that the first District Court order was not appealable after rehearing granted, (b) that the second District Court order was not entered until eight days after the notice of appeal was filed, wherefore the appeal was premature, and (c) that the orders are not appealable because they are not final (R. 39). That motion was denied.

Yet the Circuit Court of Appeals was apparently unable to decide which of the two District Court orders was reversed. The decree of reversal refers simply to "the order of said District Court" (R. 68). The mandate refers to both orders.

Subsequent to the filing of the opinion of the Court of Appeals, petitioners duly filed a petition for rehearing (R. 55), which was denied by order entered January 31, 1941 (R. 67).

In the courts below, respondent urged that petitioners represented and held out Aaron to be their attorney. But in fact they were themselves the victims of his fraudulent misrepresentation. They are his innocent clients.

It is also inaccurate to say that petitioners do not contend that Aaron was incapable to represent them in this patent controversy: his non-admission unquestionably disqualified him.

Summary of Opinions of Lower Courts

The District Court granted the motion *as a matter of law* upon the ground that in view of the provisions of Title 28, United States Code, Section 394, and General Rule 3 of the District Court, Aaron could not enter an appearance or sign a stipulation and the papers signed by him were void and, therefore, the court never acquired jurisdiction over the defendants (R. 19).

The Circuit Court of Appeals reversed, apparently *as a matter of discretion,* upon the grounds (1) that defendants did not show that they were misled by incompetent advice (R. 51), (2) that Rule 3 is addressed only to non-admitted agents (R. 52), (3) that to hold the judgment void would be unfair to the plaintiff (R. 52-53), and (4) that defendants are estopped to question the appearance (R. 53). In view of this holding the Court of Appeals did not decide the question whether petitioner corporation might enter an appearance by a layman, an additional ground stated in the opinion of District Judge Conger (R. 19); nor did the Court of Appeals pass on the claim made by respondent that petitioners' motion to vacate the judgment on the ground of illegality constituted an appearance waiving past defects.

The Court of Appeals held that the order (not specifying which) is appealable because it "constituted a denial of interlocutory relief" (R. 51).

Questions Presented

1. Is it consistent with due process of law (U. S. Constitution, Amendment V) to decide as a matter of discre-

tion, applying equitable considerations, the question whether the District Court had jurisdiction over the person of the defendants on November 24, 1939?

2. Is the question, whether the District Court had jurisdiction *in personam* over the defendants on November 24, 1939, a question of law or of discretion?

3. Can a court of original jurisdiction acquire jurisdiction *in personam* over a defendant by estoppel?

4. Where a federal statute permits one to use the misleading title "patent attorney" although he is not thereby permitted to practice law generally or to represent another in any court, and petitioners, deceived by the title and believing him to be an attorney of New York and the District Court, upon his advice authorized him to appear and consent to judgment and he did so, are petitioners forever bound by the judgment and estopped to question the District Court's jurisdiction over them?

5. Where defendants authorized one to enter an appearance in their behalf and consent to judgment against them, acting on his advice because they mistakenly, but in good faith, believed him to be a duly admitted attorney, are they guilty of an imposture by which they are estopped to question the jurisdiction of the court over their person upon the ground that their supposed attorney was not such in fact?

6. Does § 394 of Title 28, U. S. Code, authorize an appearance in an action by an agent who is not an attorney-at-law permitted by the rules of the District Court to appear therein?

7. What is the scope and meaning of General Rule 3 of the District Court? Is it intended for the protection of

litigants or is its enforcement limited to punishing or reprimanding a lay agent who violates it? Does it permit an appearance by a non-admitted agent?

8. In view of the provisions of § 394 of Title 28, U. S. Code, and of General Rule 3 of the District Court, and of the general law applicable, does the District Court, where no process is served, acquire jurisdiction over a defendant solely by virtue of a notice of appearance and a consent to judgment signed by one as "solicitor for defendants", who in fact is not admitted to the bar of the District Court and is not even qualified for admission thereto, though admitted elsewhere?

9. Does the District Court acquire jurisdiction *in personam* over a defendant by virtue of a notice of appearance signed only by a lay agent, where the defendants intended only to appear by an attorney of the court?

10. If the District Court lacked jurisdiction over the defendants when the judgment was entered, must it not be vacated on due application without regard to the effects of such vacatur?

11. May the Circuit Court of Appeals nullify a rule duly adopted by the District Court which provides that "only an attorney, solicitor or proctor of this court may enter appearances, sign stipulations * * *"?

12. Is admission to the bar of the District Court only a "formal ritual"?

13. If the judgment was void when entered for lack of jurisdiction *in personam* over them, did petitioners waive such defect by moving to vacate the judgment on grounds

other than jurisdiction, while still ignorant of Aaron's non-admission and fraud?

14. Did the order dated July 1, 1940, entered July 11, 1940, granting a rehearing and reaffirming the original decision, have the effect of vacating the first order granting petitioners' motion dated June 8, entered June 10, 1940?

15. Which was the final order disposing of petitioners' motion to vacate the judgment for lack of jurisdiction, the order entered June 10 or the order entered July 11?

16. Was the first District Court order appealable in view of the fact that a rehearing was granted?

17. Did the Circuit Court of Appeals acquire jurisdiction of the appeal from the second District Court order, entered July 11, 1940, by virtue of a notice of appeal filed July 3, 1940?

18. Is an order appealable from the District Court to the Circuit Court of Appeals which vacates an interlocutory judgment in a patent infringement suit on the sole ground of lack of jurisdiction over the person of the defendants, but makes no disposition on the merits?

Reasons for Allowance of Writ

1. In deciding that jurisdiction *in personam* over a defendant may be found in the absence of due service of process or a valid voluntary general appearance, and that the defendants are estopped to deny the essential jurisdictional facts, the Court of Appeals has in substance held that jurisdiction is a matter of discretion and not of law, and has departed from accepted principles of law, including due process of law (U. S. Constitution, Amendment V).

2. The scope and meaning of Title 28 U. S. Code, Section 394, should be definitely fixed by this Court. The Court of Appeals erred in failing to enforce that statute according to its plain meaning, that a litigant may enter an appearance only in person or "by the assistance of such counsel or attorneys at law as, by the rules of the said [federal] courts respectively, are permitted to manage and conduct causes therein."

3. This Court should construe General Rule 3 of the District Court, which is typical of similar rules of many district courts. Such rules are intended for the protection of litigants against those who wrongfully hold themselves out as attorneys of the particular district court, and it was error for the Circuit Court of Appeals to hold (a) that this rule merely forms the basis of a reprimand or punishment to a layman who violates it, (b) that this rule does not constitute a prohibition against an appearance by a non-admitted agent, and (c) that the District Court acquired jurisdiction over the defendants solely by virtue of a notice of appearance and stipulation signed by a non-admitted agent in violation of the rule.

4. This Court should determine the effect in federal courts generally of a purported appearance on behalf of a defendant by a layman holding himself out as an attorney of the court. The Circuit Court erred in holding that it conferred on the District Court jurisdiction *in personam* over petitioners, and that petitioners are bound by such an appearance.

5. The Court of Appeals departed from the law, as settled by this Court, that a rule duly adopted by a district court "has the force of law, and is binding upon the court

as well as upon the parties to an action, and cannot be dispensed with to suit the circumstances of any particular case" (*Rio Grande Irrigation Co.* v. *Gildersleeve,* 174 U. S. 608).

6. The Court of Appeals exceeded its power when it in substance nullified this rule duly adopted by the District Court by suggesting that a mild reprimand to Mr. Aaron would constitute a sufficient enforcement of the rule.

7. In holding that admission to the bar of the District Court is only a "formal ritual", the Circuit Court departed from the accepted general law that admission to the bar of a court is a condition precedent to one's power to represent another therein.

8. The Court of Appeals erred in refusing, because of equitable considerations, to affirm a district court order which declared the judgment to be void and therefore vacated it.

9. While a federal statute unfortunately encourages the unlawful practice of law by permitting certain persons to use the misleading title "patent attorney", though they may not by virtue thereof practice law generally or represent another in any court, the courts should be quick to afford relief to litigants who have been deceived by that appellation, and the Court of Appeals erred in reversing an order which did so.

10. If the Court of Appeals be correct in its view that equitable considerations are properly considered in determining the question of jurisdiction *in personam,* that Court erred in applying them to the facts of the instant case, for petitioners were guilty of no imposture.

11. The decision of the Court of Appeals is in conflict with the settled federal law that a corporation cannot enter an appearance except by an attorney of the particular court.

12. As the second district court order was not entered until July 10, an appeal filed on July 3 was premature and the Court of Appeals erred in failing to grant the motion to dismiss the appeal insofar as it was from that order.

13. In deciding that the first district court order was appealable, despite the fact that a rehearing was granted, the Court of Appeals failed to follow the law as settled by this Court.

14. There can be only one order finally disposing of one motion. In the instant case it was the order entered July 10; so the Circuit Court erred in holding that the first order was appealable.

15. The Court of Appeals erred in holding that under Title 28 U. S. Code, § 227, an order is appealable which merely vacates an interlocutory decree in a patent infringement suit on the sole ground of lack of jurisdiction *in personam* over the defendants, but does not purport to make any final disposition of the litigation, and in effect holds simply that no action is pending.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Second Circuit, commanding said court to certify and forward to this Court a full and complete transcript of the record of the proceedings in said Court of Appeals had, in the case numbered on its docket number 139, October Term 1940, entitled Moses J. Schifrin, plaintiff-appellant, against Chenille

Manufacturing Co., Inc., Harry Farber and Richard Farber, defendants-appellees, to the end that this cause may be reviewed and determined by this Court and the decree and orders of said Circuit Court of Appeals be reversed by this Court, and for such other and further relief as this Court may deem proper.

Dated: New York, May 2, 1941.

CHENILLE MANUFACTURING CO. INC.,
HARRY FARBER and RICHARD FARBER

By: ROBERT J. BLUM
Attorney for Petitioners